Woolley Development Sdn Bhd v Stadco Sdn Bhd (No 2)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–753 OF 2010

ABDUL MALIK ISHAK, KN SEGARA AND JEFFREY TAN JJCA

21 JUNE 2010

Civil Procedure — Injunction — Application for interlocutory injunction — Cause of action based on allegation of conspiracy to defraud — Whether damages adequate remedy — Whether interlocutory injunction ought not have been granted

Civil Procedure — Injunction — Application for interlocutory injunction — Injunction to restrain appellant from dealing with lands forming subject matter of agreements between respondent and third party — Whether there was cause of action to grant interlocutory injunction against appellant — Whether bona fide serious issue for trial shown against appellant — Whether there was privity of contract between appellant and respondent

The appeal arose out of an injunction issued by the High Court restraining both defendants from dealing with some lands in Seberang Prai, Penang, forming the subject matter of 192 sale and purchase agreements ('SPAs') dated 6 January 1997 made between the respondent/plaintiff and the first defendant. The appellant/second defendant was not a party to those 192 SPAs. Under the SPAs, the first defendant promised to build and transfer 192 units of shop-offices to the respondent within 36 months. However, the whole project became abandoned and none of the shop-offices were ever built.

Held, allowing the appeal with costs and setting aside the interlocutory injunction as against the appellant:

(1) The respondent had a reasonable cause of action only against the first defendant and failed to show any bona fide serious issue for trial vis-à-vis the appellant. It is trite law that no interlocutory injunction ought to be granted if the applicant for an injunction fails to show any bona fide serious issue for trial. Secondly, the respondent's alleged cause of action against the appellant was based on an allegation of 'conspiracy to defraud'. Since damages are obviously adequate remedy in a claim based on the tort of 'conspiracy to defraud', no interlocutory injunction ought to be have been granted against the appellant (see paras); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 referred.

(2) There was never any contract made between the appellant and the respondent. There was never in existence any privity of contract between them (see para 5).

(3) The respondent's allegation of 'conspiracy to defraud' was based solely on the fact that the appellant had entered into conditional contracts with the first defendant for the first defendant to transfer its lands to the appellant. Those contracts made between the first defendant and third parties could not have given the respondent any cause of action against the appellant. All that the respondent had was a straightforward case against the first defendant for breach of contract (see para 6).

(4) The respondent's plea of constructive trust, alleging that the appellant was a 'constructive trustee' for the respondent for '192 parcels' was clearly unsustainable because the first defendant never built any of those 192 units of shop offices. As the respondent had only exhibited one out of the 192 SPAs, there was no evidence before the court of the supposed location of the other 191 units of shop offices — which were never built by the first defendant. Hence, the subject matter of the alleged constructive trust did not even exist (see para 9).

[Bahasa Malaysia summary

Rayuan ini berbangkit daripada injunksi yang dikeluarkan oleh Mahkamah Tinggi menghalang kedua-dua responden daripada menguruskan beberapa tanah-tanah di Seberang Prai, Pulau Pinang, membentuk perkara subjek 192 perjanjian jual beli ('PJB') bertarikh 6 Januari 1997 yang dibuat di antara responden/plaintif dan defendan pertama. Perayu/defendan kedua bukan pihak kepada 192 PJB tersebut. Di bawah PJB tersebut, defendan pertama berjanji untuk membina dan memindah milik 192 unit kedai pejabat kepada responden dalam masa 36 bulan. Walau bagaimanapun, kesemua projek tersebut ditinggalkan dan tidak satu pun kedai pejabat tersebut dibina.

Diputuskan, membenarkan rayuan dengan kos dan mengetepikan injunksi interlokutari terhadap perayu:

(1) Responden mempunyai kausa tindakan munasabah hanya terhadap defendan pertama dan gagal untuk menunjukkan apa-apa isu serius bona fide untuk perbicaraan vis-à-vis perayu. Ia adalah undang-undang nyata bahawa injunksi interlokutari tidak patut diberikan jika pemohon untuk injunksi gagal untuk menunjukkan apa-apa isu serius bona fide untuk perbicaraan. Keduanya, kausa tindakan yang didakwa responden terhadap perayu adalah berdasarkan atas tuduhan 'conspiracy to defraud'. Memandangkan ganti rugi jelas remedi yang wajar dalam tuntutan berdasarkan tort 'conspiracy to defraud', interlokutari injunksi tidak patut diberikan terhadap perayu (lihat perenggan 3); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 dirujuk.

(2) Tidak terdapat apa-apa kontrak yang dibuat di antara perayu dan responden. Tidak pernah wujud apa-apa priviti kontrak di antara mereka (lihat perenggan 5).

(3) Tuduhan responden mengenai 'conspiracy to defraud' adalah berdasarkan semata-mata fakta bahawa perayu telah memasuki kontrak bersyarat dengan defendan pertama untuk defendan pertama memindah milik tanahnya kepada perayu. Kontrak-kontrak yang dibuat di antara defendan pertama dan pihak ketiga tidak dapat membuatkan responden mempunyai apa-apa kausa tindakan terhadap perayu. Apa yang dimiliki oleh responden adalah kes yang terus-terang terhadap defendan pertama untuk kemungkiran kontrak (lihat perenggan 6).

(4) Rayuan responden terhadap amanah konstruktif, mendakwa bahawa perayu adalah 'constructive trustee' untuk responden bagi '192 parcels' adalah jelas tidak dapat bertahan kerana defendan pertama tidak pernah membina mana-mana daripada 192 unit kedai pejabat tersebut. Memandangkan responden hanya mempamirkan satu daripada 192 PJB, tidak terdapat keterangan di hadapan mahkamah mengenai lokasi yang dikatakan mengenai 191 unit kedai pejabat yang lain — yang mana tidak pernah dibina oleh defendan pertama. Maka, perkara subjek amanah konstruktif yang didakwa tidak wujud (lihat perenggan 9).]

Notes

For cases on application for interlocutory injunction, see 2(2) *Mallal's Digest* (4th Ed 2010 Reissue) paras 3173–3184.

Cases referred to

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Saw Seng Kee v Director of Lands & Mines, Penang & Ors; Teoh Han Che v Director of Lands & Mines, Penang & Ors [1987] 1 MLJ 80 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19

Appeal from: Suit No S6–22–206 of 2002 (High Court, Kuala Lumpur).

Gan Techiong (Gan & Lim) for the appellant.
Pang Kong Leng (Cheah Teh & Su) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant in this appeal is the second defendant in the High Court below. The appeal arose out of an injunction issued by the High Court against

both defendants, to restrain both defendants from dealing with some lands in Seberang Prai, Penang, forming the subject matter of 192 sale and purchase agreements dated 6 January 1997 made between the respondent and the first defendant. It is appropriate at the outset to point out that the second defendant was not a party to those 192 agreements.

[2] At the conclusion of the hearing, we unanimously allowed the appellant's appeal with costs and ordered the interlocutory injunction to be set aside as against the appellant. In other words, the interlocutory injunction remains in force against the first defendant in the civil suit.

[3] There were two main grounds for us deciding to allow the appellant's appeal. First, we were of the view that the respondent had a reasonable cause of action only against the first defendant and have failed to show any bona fide serious issue for trial vis-à-vis the second defendant. It is trite law that no interlocutory injunction ought to be granted if the applicant for an injunction fails to show any bona fide serious issue for trial. Secondly, the respondent's alleged cause of action against the second defendant was based on an allegation of 'conspiracy to defraud'. Since damages are obviously adequate remedy in a claim based on the tort of 'conspiracy to defraud', no interlocutory injunction ought to be have been granted by the High Court against the second defendant. See *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193.

THE FACTS

[4] Briefly, the salient facts of the case are as follows. The respondent is a private limited company. in its statement of claim, it pleaded having entered into 192 sale and purchase agreements with the first defendant, a company by the name of Cherating Development Sdn Bhd on 6 January 1997 wherein the first defendant promised to build and transfer 192 units of shop-offices in Seberang Prai, Penang to the respondent within 36 months. Only 1 out of the 192 agreements was exhibited in the respondent's affidavit in the High Court below in support of their application for the said injunction. Be that as it may, learned counsel submitted that it was a standard contract and could be presumed that the other 191 agreements contained the same terms and conditions. The main term was that the purchase price was to be paid in instalments according to the progress of the construction undertaken by the first defendant. It is to be noted, at this juncture, that the first defendant's land was vacant land and 192 shop offices were supposed to be on different floors of some four-storey buildings (ground floor to third floor) — which were never constructed because the first defendant defaulted in carrying out construction. In other words, by the time the 36 months period stipulated in the agreement for the first defendant to complete construction expired on 5 January in the

new millennium, ie year 2000, the whole project was in reality an abandoned project. It is a fact admitted by all parties that at all material times — even to this day — the first defendant's lands for that project are charged to Malaysia Building Society Bhd ('MBSB').

ANALYSIS

[5] We are of the view that learned counsel for the appellant was right to point out that there was no nexus between the appellant and the respondent. This is clear as daylight because the appellant entered the scene after the 36 months period stipulated in the agreements between the respondent and the first defendant had expired on 5 January 2000. The first contract involving the appellant in the said project was in September 2000. There was never any contract made between the appellant and the respondent. In basic legal terms, there was never in existence any privity of contract between them.

[6] The respondent's cause of action against the appellant was based on an allegation of 'conspiracy to defraud'. On what basis did the respondent make this serious allegation against the appellant? Bearing in mind the irrefutable fact that the appellant and the respondent were total strangers, we could not avoid the conclusion that the respondent's allegation was far-fetched. During the course of submission, my learned brother KN Segara JCA observed that the appellant could apply to strike out the respondent's claim under O 18 r 19 of the Rules of the High Court 1980 ('RHC'). This was so obvious because whilst the respondent had a case against the first defendant for breach of contract, the respondent's allegation of 'conspiracy to defraud' was based solely on the fact that the appellant had entered into conditional contracts with the first defendant for the first defendant to transfer its lands to the appellant, and that there were other contracts made between the appellant, the first defendant and MBSB. My learned brother Jeffrey Tan Kok Wha JCA was quick to point out that those contracts made between the first defendant and third parties could not have given the respondent any cause of action against those third parties, ie the appellant or MBSB. All that the respondent had was a straightforward case against the first defendant for breach of contract. The respondent had no plausible cause of action against the appellant or against MBSB.

[7] The respondent had alleged in its supporting affidavit affirmed by its director, one Tan Aik Teck, that four cheques for RM10m each, amounting to RM40m had been paid to the first defendant as full purchase price for the 192 units of shop offices — which were never built. Learned counsel for the appellant drew our attention to the respondent's statement of claim which pleaded a sum of RM39,853,350 as the total contract price for the 192 units — which was less than RM40m. We also noted that two out of the four cheques were dated earlier than the contract date of 6 January 1997. The first cheque

was dated 20 December 1996, the second one 2 January 1997, the third cheque 6 January 1997 and the final one 9 January 1997. If this allegation was true, it certainly raised a very curious question as to why the respondent could have parted with RM20m before any contract was made, and paid up a massive sum of RM40m before any construction was done — when in fact the contract required instalment payments to be made according to the progress of construction. My learned brother Jeffrey Tan Kok Wha JCA noted that the respondent's director Tan Aik Teck actually deposed in his affidavit dated 8 May 2002 that he 'checked through the plaintiff's records and hereby produce 4 cheques issued in favour of the first defendant totalling RM40m'. It was as if the originals of those four cheques were still in the respondent's possession. How could those four cheques have remained in the possession of the respondent if they had been used to make payments to the first defendant? We also noted that those four cheques, photocopies of which were exhibited in Tan Aik Teck's said affidavit, were personal cheques of some unknown person, and not cheques issued by the respondent. The company search results of the respondent company (exhibited in an affidavit filed in the High Court) disclosed that the respondent company had neither asset nor liability of RM40m. Hence, this fact begs the question as to how the respondent, which is a private limited company incorporated in Malaysia, could have had the means of making payments amounting to RM40m, allegedly by way of four RM10m cheques paid in December 1996 and January 1997.

[8] The respondent had attempted to boost its case by submitting that in its application to lodge private caveats, it had mentioned full payment of contract price (allegedly) made to the first defendant. Further, it was submitted that in one of the contracts made involving the appellant, the appellant had apparently agreed to take-over the liabilities of the first defendant but did not mention any liability due to the respondent. The short answer to the respondent's submission is that those caveats would serve to prevent the first defendant from transferring its caveated lands to the appellant or to any third party but they would not *ipso facto* create any cause of action of 'conspiracy to defraud' against a third party who knew of the existence of those caveats. My learned brother KN Segara JCA hit the nail on the head when His Lordship pointed out to the respondent's counsel that his client should have made progress payments according to the sale and purchase agreement, and need not have made any payment because the first defendant never built any of those 192 shop offices. The respondent had full knowledge that the first defendant's lands were charged to MBSB and could not have been transferred to anybody until and unless the charges have been discharged. If the respondent did indeed pay the first defendant as it alleged, it has done so at its own peril and cannot be allowed to use its own folly to create a cause of action against a stranger. Unless the respondent has some other undisclosed evidence to adduce, it simply cannot sustain any claim against the appellant based on a contract made between the appellant and the first defendant. There is no privity of contract to enable the

respondent to rely on contracts made between the first defendant and third parties — which were not intended to benefit the respondent.

[9] The respondent had also attempted to plead constructive trust, alleging that the appellant is a 'constructive trustee' for the respondent for '192 parcels'. This allegation is again clearly unsustainable because as highlighted above, the first defendant never built any of those 192 units of shop offices. As the respondent had only exhibited one out of the 192 agreements, there was no evidence before us of the supposed location of the other 191 units of shop offices — which were never built by the first defendant. Hence, the subject matter of the alleged constructive trust did not even exist.

[10] We were well aware of the rule that it is not the court's function at this stage of the litigation to try to resolve any conflict of evidence on affidavit. However, we have considered the respondent's case based on its own statement of claim and affidavits, and thereby arrived at the inevitable conclusion that the respondent had failed to show bona fide serious issues for trial to justify an interlocutory injunction. There was absolutely no privity of contract between the respondent and appellant. The respondent's allegation of payment of RM40m in its affidavit contradicted its own statement of claim as well as its own accounts filed with the companies commission of Malaysia.

[11] Further, damages are obviously adequate remedy because the respondent's cause of action against the second defendant is based solely on an allegation of 'conspiracy to defraud'. It is trite law that no interlocutory injunction ought to be issued in this kind of situation. In *Saw Seng Kee v Director of Lands & Mines, Penang & Ors*; *Teoh Han Che v Director of Lands & Mines, Penang & Ors* [1987] 1 MLJ 80, Edgar Joseph Jr J held that if damages would be adequate remedy, there is no need to consider the further question of balance of convenience. His Lordship held at pp 81–82 of the report:

> In the *Cyanamid* case, Lord Diplock made the same point at pp 408 B & C in the following terms:
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> The court should first consider whether, if the plaintiff were to succeed at the trial in establishing its right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendants continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages … would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.
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> In these circumstances, *as I had no doubt as to adequacy of the plaintiffs' remedy lying in damages should they succeed in their claims at the final hearing, there was no need for me to consider the further question of the balance of convenience* (see the *Cyanamid* case at p 408).

[12] As pointed out above, the respondent had a cause of action for breach of contract against the first defendant. Counsel for the respondent informed us that judgment had been entered against the first defendant but the first defendant had been wound up. In this situation, all that the respondent could do is to join the other unsecured creditors of the first defendant to await distribution of dividend, if any, from the liquidator. The fact that the first defendant has been wound up certainly did not give the respondent any additional right to make a claim against the appellant.

CONCLUSION

[13] For the reasons adumbrated above, we were satisfied that the learned High Court judge had erred in issuing the interlocutory injunction against both defendants. And since the respondent had given an undertaking to pay damages to the appellant if the appellant had suffered any damages by reason of the said injunction, the appellant is at liberty to apply for damages to be assessed by the High Court and paid by the respondent. Thus, we unanimously allowed the appellant's appeal with costs here and below to the sum of RM25,000 only, ordered the interlocutory injunction dated 5 September 2002 against the appellant to be set aside forthwith, and the appellant's deposit to be refunded.

Appeal allowed with costs and interlocutory injunction as against appellant set aside.

Reported by Kanesh Sundrum